IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

NO._____

JOHNNIE LEE MORRIS,

Petitioner

vs.

THE STATE OF TEXAS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Your petitioner, Johnnie Lee Morris, respectfully submits his petition for a writ of certiorari to review the judgment and decree of the Court of Criminal Appeals of Texas in the above entitled cause, and for such petition, says:

1. That your petitioner is a citizen of the United States and of the State of Texas, and a member of the African or Negro race.

2. That the Court of Criminal Appeals of Texas is the court of last resort in criminal matters in Texas under the Constitu-

tion and laws of the State of Texas. That during the August term, 1951, in Criminal District Court Number 3, Harris County, Texas, the Grand Jury in and for said Court, returned a bill of indictment into said court against your petitioner, who is a Negro citizen, charging him with the offense of murder with malice of one Florian Antone Nowak, a white man, alleged to have occurred in Harris County, Texas on or about the 11th day of October, 1951.

That prior to the commencement of the trial and prior to the plea of the defendant, said defendant in due time filed his motion to quash the indictment. That such motion was in all things overruled by the Court.

That after the selection of the petit jury and prior to pleading to the indictment, petitioner filed his motion to quash the petit jury on the ground that petitioner had been discriminated against on account of race and color and duly presented the same to the Court, and such motion was in all things overruled by the trial court.

That thereafter, the defendant pleaded not guilty, and the trial proceeded; that the defendant was found guilty of murder with malice and sentenced to life imprisonment.

That thereafter, the defendant filed a motion for a new trial which said motion was amended and in the time allowed by law presented to the court, and was thereafter overruled by the Court.

In due time this cause was appealed to the Court of Criminal Appeals of Texas, and that on the 11th day of June, 1952, the judgment of the trial court was affirmed by the Court of Criminal Appeals of Texas.

That in due time the defendant filed his motion for a rehearing in the Court of Criminal Appeals of Texas, and this motion

was in all things overruled by the Court of Criminal Appeals of Texas on the 15th day of October, 1952; that thereby said judgment of conviction against this petitioner became final insofar as the courts of the State of Texas are concerned.

The Court has jurisdiction under Section 1257 (3) Title 28, United States Code, Annotated and Supreme Court Rules 36, 38 and 38½. The jurisdiction and duty of this court to make an independent appraisal of the facts where a claim is made that a federal right has been denied has often been restated. See *Norris v. Alabama*, 294 U. S. 587, 590; 79 L.Ed. 1074, 1077. This cause is reported in 251 S W. (2) p. 731

Federal Questions

That upon the trial of this cause in the trial court, as well as on appeal to said Court of Criminal Appeals of Texas, federal questions were involved, all of which were decided against petitioner, as follows:

1. That the District Attorney, an administrative officer of the State of Texas, discriminated against the petitioner and members of the Negro race on account of race and color in the selection of the petit jury, and the Court of Criminal Appeals held that the District Attorney, as an officer of the State of Texas, may discriminate against the appellant on account of race and color and not be amenable to the Federal Constitution providing for equal protection of laws.

2. That the undisputed evidence shows that the District Attorney, an administrative officer of the State of Texas, discriminated against the petitioner and members of the Negro race on account of race and color by the exclusion of qualified members of the Negro race in the selection of the petit jury, and the Court of Criminal Appeals held that the District Attorney, as an officer of the State of Texas, may discriminate against

the appellant on account of race and color without violating rights guaranteed petitioner, and the same would not be a denial to the appellant of rights guaranteed and secured to him under the Federal Constitution.

3. That the Court of Criminal Appeals held, that notwithstanding the fact that the undisputed testimony showed that members of the Negro race had been excluded from the petit jury in Harris County for over thirty (30) years on account of race and color, and they were excluded from the petit jury which tried the defendant under the same scheme as had been used for thirty (30) years, that the District Attorney of Harris County was at liberty to so discriminate against members of the Negro race in the selection of the petit jury under his discretionary power under the Texas Statute, that such discrimination on account of race and color was not a violation of rights guaranteed under the Federal Constitution.

4. That the members of the Negro race in the selection of a grand jury may be limited to one (1) member of the Negro race on one (1) grand jury, and excluded altogether from other grand juries on account of race and color, and that such exclusion and limitation on account of race and color was not a violation of rights guaranteed to appellant under the Federal Constitution.

5. That members of the Negro race in the selection of grand jury commissions, may be limited to one (1) on three (3) grand jury commissions, and all other members of the Negro race on account of race and color be excluded from service on grand jury commissions in Harris County, Texas, for a period of thirty (30) years; and that such exclusion and limitation of members of the Negro race from service on the Grand Jury Commissions were not a violation of rights guaranteed and secured to petitioner under the Federal Constitution.

Reasons Relied On for Allowance of Writ

1. The decision of the Court of Criminal Appeals of Texas involves important questions of federal law and of the Constitution of the United States.

2. The decision of the Court of Criminal Appeals of the State of Texas herein was and is contrary to the numerous decisions of this court in applicable cases.

3. The decision of the Court of Criminal Appeals of Texas herein was such that the guarantees of equal protection of law to petitioner as provided by the Constitution were denied.

4. The decision of the Court of Criminal Appeals of Texas was such as to deprive petitioner of his liberty without due process of law in violation of the Constitution of the United States.

5. The decision of the Court of Criminal Appeals of Texas herein involves important questions of federal procedure, and so far departs from the usual course of procedure as to bring this case within the rule for review by this Honorable Court.

WHEREFORE, for the reasons stated, your petitioner, Johnnie Lee Morris, respectfully prays that the court, by writ of certiorari issued under the seal of this court, directed to the Judges of the Court of Criminal Appeals of the State of Texas, command and direct said Court of Criminal Appeals of Texas to certify to this court a full and complete transcript of the record had in this cause to the end that the same may be reviewed and determined by this court as provided by law, and that the judgment and sentence of the Criminal District Court of Harris County, Texas, and the decision of the Court of Criminal Appeals of the State of Texas, be in all things reversed, and for such other and further relief to which your

petitioner may be entitled.

Petitioner further respectfully prays the court that it issue its most gracious order directed to the Court of Criminal Appeals of the State of Texas commanding said court to stay further proceedings herein until this petition has been considered and determined by this court.

JOHNNIE LEE MORRIS

UNITED STATES OF AMERICA

STATE OF TEXAS SS

COUNTY OF BRAZORIA

I, Johnnie Lee Morris, being duly sworn, depose and say that I am the petitioner in the above entitled cause; that I have read the foregoing petition and that the same is true as I verily believe.

Johnnie Lee Morris

Subscribed and sworn to before me by the petitioner, Johnnie Lee Morris, on this the 18th day of December, 1952.

Z. E. Harrelson
NOTARY PUBLIC IN AND FOR
BRAZORIA COUNTY, TEXAS

W. J. DURHAM
Excelsior Life Building
2600 Flora Street
Dallas, Texas

THOS. H. DENT
2505½ Market Street
Galveston, Texas
Attorneys for Petitioner.

We, W. J. Durham and Thos. H. Dent, attorneys and counsellors at law, admitted to practice in the Supreme Court of the United States, hereby certify that we prepared the foregoing petition for a writ of certiorari and know the contents thereof; that the same is not made for the purpose of delay; and that in our opinion said petition is meritorious and well founded in law, and ought to be granted and the writ issued.

W. J. DURHAM

THOS. H. DENT

HENRY E. DOYLE
Houston, Texas
Of Counsel

Office Supreme Court, U.S.
FILED
JAN 19 1953
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

NO. 538

JOHNNIE LEE MORRIS,

Petitioner,

vs.

STATE OF TEXAS,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR PETITIONER

Opinion in the Court Below

The opinion of the Court of Criminal Appeals of Texas is reported in *Morris* v. *The State of Texas*, 251 S. W. (2) 731.

The opinion appears at pages 513-19 of the Transcript of the Record filed herein.

No opinion was written, filed or rendered by the Trial Court.

Jurisdiction

The decision of the Court of Criminal Appeals affirming the judgment of the Criminal District Court Number 3 of Harris County, Texas, was rendered on the 11th day of June, 1952. A motion for rehearing was thereafter filed, and the Court of Criminal Appeals of Texas overruled such motion on the 15th day of October, 1952. That upon the overruling of said motion for rehearing by the Court of Criminal Appeals of Texas, the judgment of that court affirming the judgment of the Criminal District Court Number 3 of Harris County, Texas, became the final judgment of the Court of Criminal Appeals of Texas in this case.

The Court of Criminal Appeals is the court of last resort under the laws of the State of Texas in criminal cases.

The Jurisdiction in this case rests upon Section 1257 (3) and Section 2106 of Revised Title 28, United States Code; see also Section 237 (b) of the Judicial Code as amended, and 28 U.S.C. Section 344 (b) and Supreme Court Rules Thirty-six (36) Thirty-eight (38) and Thirty-eight and one-half (38½).

The jurisdiction and duty of this Court to make an independent appraisal of the facts where claim is made that a Federal right has been denied has often been restated, e.g. *Norris* v. *Alabama*, 294 U. S. 587, 590, 79 L. Ed. 1074, 1077.

Statement of the Case

1. The Record

On the 17th day of October, 1951, petitioner, a Negro citizen of Texas and of the United States, was indicted for murder by a grand jury of Harris County, Texas. The grand jury commission of three was wholly composed of white men. A motion

to quash the indictment for racial discrimination was seasonably filed by petitioner's counsel (Tr. 20), and in response thereto, the State of Texas filed its answer denying discrimination, and affirmatively pleading its policy in the selection and appointment of grand jury commissioners (Tr. 27). Upon the issues tendered by the pleadings, the petitioner offered the following testimony to support his allegation and contention of racial discrimination in the selection and appointment of grand jury commissioners:

Mr. J. L. Gaston testified (Tr. 172) that Negro citizens live in every section of Harris County, Texas; he testified to the percentage of Negro citizens of Harris County with whom he was acquainted who could read and write; the number of citizens of Harris County who were property owners and eligible voters over a long period of time prior to the date the indictment was returned against the petitioner and the date the grand jury commissioners were appointed who selected the members of the grand jury that indicted the petitioner (Tr. 173).

Mr. C. T. Lee (Tr. 180) testified as to the period of time he had lived in Harris County, Texas; of the percentage of Negro citizens residing in Harris County who could read and write who were qualified voters of good reputation and who were property owners.

The witness, Mr. F. T. Henry (Tr. 189) testified as to the number of Negro citizens who had paid their poll taxes for a number of years immediately preceding the date the indictment was returned against the petitioner; the number of Negro citizens who were qualified voters; property owners; and the percentage of illiteracy of Negro citizens.

Mr. George Nelson testified (Tr. 197) as to the number of Negro citizens in Harris County that he knew who could read

and write the English language who were property owners and qualified voters.

Judge King testified (Tr. 200) that he had been in Harris County since 1921; that he had been judge of one of the Criminal District Courts of Harris County since 1928; that prior to 1941 he never knew of a Negro citizen being appointed to serve on the grand jury commission; that since 1928, only four (4) members of the Negro race had been appointed to serve on the grand jury commission, and that only one (1) Negro was appointed to serve on each grand jury commission during the four (4) times that a Negro citizen had been permitted to serve as a grand jury commissioner; that in his opinion, there were many Negroes in Harris County eligible to serve on the grand jury.

Judge Williford testified (Tr. 219) that only one (1) Negro had been appointed to serve on four (4) different grand jury commissions during the time he had been in Harris County, Texas, and had served as judge; that never more than one (1) Negro was appointed and permitted to serve on any one grand jury.

Mr. W. H. Hollins testified (Tr. 223) that he had been in Harris County thirty-seven (37) years, and that his company had made a survey of the qualified Negro voters in Harris County; property owners; and of the number of Negro citizens who could read and write the English language; that the survey showed that ninety (90%) per cent of the Negro citizens in Harris County, Texas could read and write; that more than fifty (50) thousand owned real estate and were, therefore, freeholders in the county, and approximately fifty (50) thousand were eligible to vote under the laws of the State of Texas and the Constitution of the United States.

It was agreed between the counsel for the State, the State of Texas, counsel for petitioner and petitioner, that:

> During the time embraced between the September Term of the District Court of Harris County, 1936, and the November Term of said Court, 1951, there have been drawn in Harris County, Texas, sixty-one (61) grand jury commissions; that four (4) members of such commissions have been members of the Negro race, and that only one (1) Negro was appointed to serve on four (4) different grand jury commissions; that the District Judges who drew the names and appointed the members of the grand jury commissions of the sixty-one (61) grand jury commissions that have been empaneled since the September Term of said Court, 1936, each, was a white man and a member of the Caucasian race (Tr. 171).

After the above testimony was offered, the Trial Court overruled petitioner's motion to quash the indictment for racial discrimination in the formation of the grand jury.

Thereafter, the court proceeded to have a petit jury selected, and after the selection of the petit jury, and before petitioner pleaded to the indictment, the petitioner filed his motion to quash the petit jury panel for racial discrimination in the selection and empaneling of the petit jury in this case (Tr. 52).

The witness, Mr. Grovey, testified as to the system and practice of excluding Negro citizens from serving on petit juries in Harris County, Texas for the last thirty-four (34) years; that he was summoned as a prospective juror (petit) on three (3) different occasions in the last thirty-four (34) years, and upon each occasion after he had gone into the District Courtroom, he was excused and told that no "Colored would be used." That he was excused along with all the other Negro citizens

who appeared on the panel at each time he was called to serve; that he was excused in the same manner on each of the occasions, except one, when he was questioned, and then excused (Tr. 262).

Mr. Joseph Batiste testified (Tr. 282) that he was summoned for jury service (petit) on three (3) different occasions; that he was excused each time and advised that "no Colored would be used," and that the other Negro citizens who appeared on the panel each time he was called, were excused in the same manner and for the same reason.

Mr. T. P. Smith testified (Tr. 278) that during the ten (10) years immediately preceding the trial of this case, he had been called on a jury (petit) panel, and that he was advised that "no colored would be used," and that there were several other members of the Negro race who appeared at the time the witness appeared for jury service, and they were likewise excused in the same manner and for the same reason.

The witnesses, Mr. Grovey, Mr. Smith, Mr. Lee and Mr. Batiste, testified (Tr. 000) that no Negro citizen had been permitted to serve as a member of the petit jury in a criminal case in Harris County, Texas during their residence in Harris County, Texas. Mr. Grovey testified that he had lived in Harris County for thirty-four (34) years and Mr. Batiste, twenty-five (25) years.

It was agreed between the State, counsel representing the State of Texas, petitioner and counsel representing petitioner, that (Tr. 286-87) during the examination of the members of the special venire in this case, there were the names of fifteen (15) Negro citizens on the special venire and the names of one hundred eighty-nine (189) members of the white race; that two (2) of the Negro veniremen were excused at their request upon asserting legal excuses—one asserting his exemption, that

he was over sixty (60) years of age. One advised the court that his father was ill and bedridden. That thirteen (13) names of members of the Negro race were left on the jury list after the two were excused, eight (8) of whom disqualified themselves by their answers, one stating that he had a fixed opinion as to the guilt or innocence of the petitioner; the other seven (7) stating that they had conscientious scruples against the infliction of death as a punishment for crime; the other five (5) Negro citizens whose names appeared on the special venire were not excused for cause, and did not claim any exemption; they were peremptorily challenged by the District Attorney; that of the one hundred eighty-nine 189) names of the white citizens who appeared on the special venire and who were examined, only two (2) of the white members whose names appeared on the special venire were peremptorily challenged by the District Attorney in this case.

The State offered no controverting testimony to the testimony offered on illegal racial discrimination in the selection of the petit jury. The court after hearing such testimony overruled petitioner's motion.

ERRORS RELIED UPON

1. The Court of Criminal Appeals of Texas erred in holding and finding that the selection of the members of the petit jury in this case under the statutory plans set up for the selection of said jury as administered and applied by the District Attorney of Harris County, Texas, was not applied in such manner as to illegally discriminate against the petitioner on account of race and color, and that such illegal discrimination did not deny to petitioner rights guaranteed to him under the Federal Constitution.

2. The Court of Criminal Appeals of Texas erred in finding and holding that under the statutory scheme set up by the State of Texas for the selection of petit juries, that the District Attorney of Harris County, Texas under the peremptory challenge provision of said scheme has unlimited authority to administer and exercise such peremptory challenge by excluding members of the Negro race from serving on the petit jury in this case on account of race and color, and that the action of the District Attorney in excluding members of the Negro race on account of race and color from serving on the petit jury in this case is not a denial to the petitioner of rights guaranteed to him under the Federal Constitution.

3. The Court of Criminal Appeals of Texas erred in holding and finding that the District Attorney of Harris County, Texas in the exercise of peremptory challeges allowed by the laws of the State of Texas in the selection of the petit jury in this case did not administer and apply such law to members of the Negro race who were members of the special venire in such manner as to illegally discriminate against this petitioner and the members of the Negro race on account of race and color.

4. The Court of Criminal Appeals of Texas erred in holding that the petitioner was not systematically, intentionally and purposefully discriminated against on account of race and color by the State of Texas in the selection of members of the petit jury in this case, in violation of the petitioner's constitutional rights.

5. The Court of Criminal Appeals of Texas erred in

holding that the petitioner was not systematically, intentionally and purposefully discriminated against on account of race and color in the selection of grand jury commissioners who selected the grand jury that returned the indictment against petitioner by exclusion and limitation of members of the Negro race on the grand jury commission and appointed by the District Judge of Harris County, Texas, in violation of rights guaranteed and secured to the petitioner under the Federal Constitution.

Argument and Authorities Discussed

Racial discrimination on account of race and color in the appointment and formation of the grand jury commission which selected the grand jurors who returned the indictment against the petitioner was shown in this case by both limitation and exclusion without any dispute in the evidence. Therefore, petitioner contends that this Honorable Court has jurisdiction to grant his petition for writ of certiorari. This contention of the petitioner is supported in the decision of this court in the case of *Cassall* v. *State of Texas*, (339 U.S. 282).

The petitioner in the State Court contended that he was entitled under the Federal Constitution to be tried upon an indictment returned against him by a grand jury that had been selected by a grand jury commission without any illegal discrimination being practiced against him and members of the Negro race on account of race and color. He further contended in the Trial Court that he was likewise entitled to be tried by a petit jury selected and empaneled without any illegal discrimination practiced against him by the District Attorney of Harris County, Texas, and members of the Negro race on account of race and color.

The further contention was made by the petitioner that the above right guaranteed and secured to him by the Federal Constitution had been violated in the selection and appointment of the grand jury commission, for the reason that over a period of forty (40) years members of the Negro race had been either limited or excluded from serving on grand jury commissions in Harris County, Texas, on account of race and color and that during the same forty-year period the petitioner and members of the Negro race had been wholly excluded from serving on petit juries in criminal cases in Harris County, Texas, on account of race and color. These claimed rights and violation of such rights were presented to and passed on by the Trial Court and the Court of Criminal Appeals of the State of Texas adversely to the contention and claim of the petitioner.

Petitioner submits that this Court has jurisdiction and that it is the duty of this Court to grant his petition for writ of certiorari, for the reason that where a Federal right is claimed in the State Court, as was claimed in this case, that this Honorable Court must inquire whether such right was denied, and that this Court's inquiry is not confined to merely determining whether such right was denied in express terms; but it is the duty and power of this Court to examine the record and determine for itself whether such right has been denied in substance and effect.

It appears that the right of the petitioner to have this Court pass upon the issues raised in the State Court and the Court's power and duty to determine whether such right has been violated, was settled and determined by the opinion of this court in the case of *Norris* v. *the State of Alabama*, 55 Supreme Court Reporter, 579 (294 U.S. 587), and the Court announcing such right, speaking through the late Mr. Chief Justice Hughes, said:

> "When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured."

In this case the evidence is without dispute as to the limitation of the number of Negro citizens who have been permitted to serve on the grand jury commission, which was four (4) in the history of the Court, and as to the exclusion of members of the Negro race from all other grand jury commissions over a period of thirty or forty years.

The Court of Criminal Appeals of the State of Texas and the Trial Court found that there was no evidence whatever to support such claim that illegal discrimination on account of race and color had been practiced against the petitioner and members of the Negro race, either by exclusion or limitation. The testimony is without absolutely any dispute that Negro citizens in Harris County, Texas over a period of thirty or forty years prior to the date petitioner was tried, whenever their names appeared on the jury list, they were advised when they appeared for jury service that "Colored would not be used or needed," and that no person of African descent and of Negro blood had been permitted to serve on a petit jury in a criminal case within the memory of either of the witnesses, including

the judges of the Courts who testified, and that in this case all Negro citizens who were on the jury list (petit jury) who were not disqualified for cause, were peremptorily challenged by the State.

Upon the record in this case, the Trial Court and the Court of Criminal Appeals of Texas found that there was no evidence of illegal discrimination on account of race and color in the selection of the petit jury in this case.

The evidence being without dispute, a legal question was presented as to whether a Federal right guaranteed to the petitioner under the Federal Constitution had been violated. The Court of Criminal Appeals having found that there was no evidence to support the alleged claim of illegal racial discrimination, presents a question which this Court has a right to determine.

The case of *Charles D. Criswell et al* vs. *Grand Lodge Knights of Pythias of Georgia, et al,* 32 Supreme Court Reporter, 822 (225 U.S. 246) was a case appealed directly from the Supreme Court of the State of Georgia and the question was raised as to whether upon the undisputed facts in the record this Court had jurisdiction to determine the federal issue and the Court expressed the view of the Court and the law in the following language:

> "While it is true that upon a writ of error to a state court we do not review findings of fact, nevertheless two propositions are as well settled as the rule itself, as follows: (a) that where a Federal right has been denied as the result of a finding of fact which it is contended, there was no evidence whatever to support, and the evidence is in the record, the resulting question of law is open for decision; and (b) that where a

> conclusion of law as to a Federal right and a finding of fact are so intermingled as to cause it to be essentially necessary, for the purpose of passing upon the Federal question, to analyze and dissect the facts, to the extent necessary to do so the power exists as a necessary incident to a decision upon the claim of denial of the Federal right."

It would, therefore, further appear that this Court has jurisdiction to grant petition for writ of certiorari and correct the injustice done the petitioner in the trial of this case.

The following cases appear to sustain the petitioner's position and duty of this Court to grant the petition for writ of certiorari:

> *Angel* v. *Bullington*, 67 Supreme Court Reporter 657 (330 U.S. 183)
>
> *Oyama* v. *The State of California*, 68 Supreme Court Reporter, 269 (332 U.S. 633).

THE QUESTION WHETHER A STATE OFFICER IN ADMINISTERING OR ACTING UNDER A STATE LAW IN THE DESIGNATION AND APPOINTMENT OF MEMBERS OF GRAND JURY COMMISSIONS, HAS APPLIED SUCH LAW IN SUCH MANNER AS TO ILLEGALLY DISCRIMINATE AGAINST ALL MEMBERS OF THE NEGRO RACE, OR TO LIMIT THE NUMBER OF NEGROES PERMITTED TO SERVE ON GRAND JURY COMMISSIONS ON ACCOUNT OF RACE AND COLOR, THIS COURT WILL DETERMINE FOR ITSELF WHETHER A FEDERAL RIGHT HAS BEEN VIOLATED AND IS NOT BOUND BY THE DECISION OF THE STATE'S HIGHEST COURT AS TO THE MEANING AND APPLICATION OF SUCH LAW.

The State of Texas has by law provided for the selection of grand jury commissions. Texas Code of Criminal Procedure, Article 333 of the Code provides for the appointment of the commissioners. Article 334 of the Code provides for the notice of the appointment. Article 335 provides for the oath of the commissioners. Article 336 provides for instruction to the commissioners by the judge of the Court. Article 337 of the Code provides for the meeting and the manner of the deliberation of the commissioners. Article 338 provides for the selection of the members of the grand jury by the commission. Article 339 of the Code sets out the qualifications of the grand jury commissioners.

Each of the above Articles is a part of Title 7, Section 1 of the Practice Code set up by the State of Texas in criminal proceedings.

The Court of Criminal Appeals of Texas, in denying petitioner's contention that there was illegal racial discrimination in the selection and organization of the Grand Jury Commission in Harris County, Texas, over a period of thirty (30) or forty (40) years immediately prior to the trial of this case, said that the Court had not been cited to any case holding that racial discrimination in the selection and formation of a grand jury commission was forbidden by the Constitution of the United States.

In the year 1902, the Court of Criminal Appeals of Texas in the case of *Smith* v. *State*, 69 S. W. 151 had before it the identical issue as the issue presented to the same court; that is, illegal discrimination on account of race and color in the selection and formation of the Grand Jury Commission in Grayson County, Texas; and the Court, speaking through Mr. Justice Henderson, sustained a similar contention as made by the defendant in that case to the contention and claim of the petitioner

in this case, and the Court announced the law in the following language:

> "And taking this testimony, in connection with that before shown, as also that of other witnesses, both for the state and the defendant, *it is evident to our minds that, in the appointment of the jury commissioners who prepared the lists from which the grand and petit juries were formed, discrimination was shown against the colored race;* that is, such as the supreme court of the United States would hold to be a discrimination and a denial to appellant of the equal protection of the laws. *We further hold that the jury commissioners so appointed could hardly be expected to perform their duties without discrimination and with absolute impartiality.* Concede, however, that a tribunal so constructed might prove equal to the responsibilities thus cast upon them; still we believe that a perusal of their testimony shows that their conduct would be regarded by the supreme court of the United States as discriminatory against appellant, as a member of the colored race, in drawing the lists of grand and petit jurors who presented the indictment, and from which the petit jury was made up that tried him." (Our italics)

This case has never been overruled, modified or criticised since the date the opinion was delivered and entered by the court in the *Smith* case, that the exclusion of Negro citizens on account of race and color in the appointment of grand jury commissioners was illegal discrimination forbidden by the Constitution, and that an indictment returned against a Negro citizen by a grand jury selected by such commissioners in which discrimination was shown on account of race and color, was a violation of rights guaranteed under the Federal Constitution.

Petitioner submits that the rule of law announced in the *Smith* case comports with the decisions of this Court on racial discrimination in the selection of grand jurors. It would be inconsistent thinking, and could hardly be expected, that the members of a grand jury commission appointed and from which Negro citizens were excluded, would perform their duty in the selection of a grand jury without racial discrimination. It would be inconsistent reasoning that, if, in the appointment of a grand jury commission, Negro citizens were discriminated against; that the agency so created by the practice of illegal racial discrimination could or would set in motion any agency that would be free of racial discrimination in its action and deliberations. The grand jury commission being illegally organized and formed on account of racial discrimination, would be without legal authority to set up any legal agency—grand jury. Therefore, the grand jury that returned the indictment against petitioner was not a legal grand jury.

Members of the Negro race in the formation of the grand jury commission had been illegally discriminated against on account of race and color, as shown by the evidence, by exclusion and limitation. Such discrimination has been condemned by this Court in the selection of grand juries in the following cases:

Cassell v. *Texas*
70 Sup. Ct. 629 (339 U. S. 82)

Smith v. *Texas*
61 Sup. Ct. 164 (311 U. S. 128)

Patton v. *Mississippi*
68 Sup. Ct. 184 (332 U. S. 143)

Virginia v. *Rives*
100 U. S. 313

Strauder v. *West Virginia*
100 U. S. 303
Rogers v. *Alabama*
192 U. S. 226
Neal v. *Delaware*
103 U. S. 370
Hollins v. *Oklahoma*
295 U. S. 370
Carter v. *Texas*
177 U. S. 442
Akins v. *Texas*
325 U. S. 398

THE QUESTION WHETHER A STATE OFFICER IN ADMINISTERING OR ACTING UNDER A STATE LAW IN THE SELECTION OF THE MEMBERS OF A PETIT JURY, HAS APPLIED SUCH LAW IN SUCH MANNER AS TO ILLEGALLY DISCRIMINATE AGAINST ALL MEMBERS OF THE NEGRO RACE IN SERVING ON PETIT JURIES, ON ACCOUNT OF RACE AND COLOR, THIS COURT WILL DETERMINE FOR ITSELF WHETHER A FEDERAL RIGHT HAS BEEN VIOLATED AND IS NOT BOUND BY THE DECISION OF THE STATE'S HIGHEST COURT AS TO THE MEANING AND APPLICATION OF SUCH LAW.

The State of Texas as a part of its local practice act has enacted a set of laws for the formation and selection of petit juries in capital cases. These laws are under Title Eight (8) of the Code of Criminal Procedure of the State of Texas. Chapter two (2) of Title Eight (8), Articles 587-601-A, sets out the manner and method of empaneling a special venire. Chapter Three (3) of Title 8 (8), Articles 602-625, sets out the manner of jury call, questions to be propounded, excuses of jurors, claims of exemption from service, challenge of jurors, the mode of questioning jurors, qualifications of jurors, the

reasons therefor and the manner of handling jurors during the trial. Article 614, Title Eight (8) Chapter Three (3) provides for peremptory challenge of prospective jurors.

In the trial of this case, no Negroes were permitted to serve on the jury because of the peremptory challenge exercised by the District Attorney. Prior to the trial of this case with one exception, when one Negro citizen was questioned and then excused, Negro citizens had been excluded from serving on petit juries in Harris County, Texas over a period of thirty (30) or forty (40) years, in that Negro citizens who had been called for jury service were advised before the selection of the jury started, that "Colored would not be used" and, thereupon, all members on the panel who were members of the Negro race were excused. In this case the names of the Negroes who appeared on the list of prospective jurors were actually interrogated and those who did not disqualify themselves for cause, being five (5) in number, were prevented from serving by a peremptory challenge exercised by the District Attorney of Harris County, Texas.

The Court of Criminal Appeals in denying that racial discrimination had been practiced against the petitioner and the members of the Negro race by the District Attorney, rested its judgment upon the opinion of the Texas Court of Criminal Appeals in the case of *Ross* v. *State*, 246 S. W. (2) 884, wherein the Court held.

> "State's counsel having the unlimited right to exercise a peremptory challenge without giving any reason therefor, *it is immaterial when, where, how or in what manner that the right is or has been exercised.* (Our italics.)

In the opinion in the *Ross* case and upon which the Court rested its opinion in this case, the Court held that under Article

614 the District Attorney may apply such article so as to exclude all members of the Negro race on account of race and color from serving on a petit jury where a Negro citizen was being tried, without violating rights guaranteed to petitioner under the Federal Constitution, for the Court's opinion in effect held that, he may apply such law to exclude Negroes and for no other purpose, and still not violate the mandates of the Constitution against discrimination on account of race and color in the selection of jurors, for the Court said that the district attorney has the unlimited right to exercise such peremptory challenge as he desires, and in whatever manner he desires, which holding gives the district attorney the right to apply such peremptory challenge on account of race and color whenever, wherever, however, and in whatever manner he so desired.

On June 18, 1952, in the case of *Hernandez* v. *State*, 251 S. W. (2) 531, wherein a Negro citizen was not involved, the Court of Criminal Appeals of Texas had before it the question of racial discrimination in the selection of grand and petit juries, and the Court, speaking through Mr. Commissioner Davidson, stated the law in the following language:

> "Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States . . .
>
> "The rule, as thus established, applies equally to petit jury selection."

It is significant to note that this case was decided on June 11, 1952, and the *Hernandez* case was decided on June 18, 1952 by the same court. It is further significant that the record reflects that on the jury list (petit) in this case only fifteen (15) names of Negro citizens appeared. Under the Practice Act of Texas, Article 614, the State is entitled to fifteen (15) peremptory challenges. Under the local Practice Act of Texas, the District Attorney can, through the practice of racial discrimination, forever bar members of the Negro race from ever serving on a petit jury in Texas under the opinion of the Texas Court of Criminal Appeals in this case, for under such holding he can whenever, wherever, and in whatever manner, and for whatever purpose he desires, exclude members of the Negro race from serving on the petit juries on account of race and color. He can on account of race and color, under such holding, exclude Negro citizens under the local rules of practice without violating rights guaranteed under the Federal Constitution; that is, the petitioner can, through the subtlety of the District Attorney, be discriminated against by the exercise of the peremptory challenge because he is a Negro citizen without violating the very right that the Constitution has guaranteed and secured to the petitioner—that no discrimination shall be practiced against him in the selection and formation of the petit jury trying him. Petitioner submits that a local rule of practice is not a shield for the district attorney in the violation of Federal rights, and that this Court will make an independent investigation of a substantial Federal question actually determined in the early stages of the trial when the final judgment is brought before this Court for review. That the local rule of practice is not a bar to this Court's independent consideration of any substantial Federal question actually determined in the state court. Such position appears to have support in the opinion of the court in *Urie* v. *Thompson*, 69 Sup. Ct. 1018 (337 U. S. 163).

The State of Texas seeks to escape the violation of a Federal right by the district attorney by a claim that the State Practice Act (Texas Code of Criminal Procedure) gives the District Attorney unlimited right to use the peremptory challenge provision in the statute for whatever purpose he desires, including racial discrimination in the selection of petit juries The State of Texas cannot escape the mandates of the Constitution to equal protection of laws by violating such right and then finding shelter for the violation thereof under the Texas Practice Act. Rights guaranteed and secured by the Federal Constitution to its citizens cannot be evaded by the form of local practice, which rule was announced by this Court in *Rogers* v. *State of Alabama*, 24 Sup. Ct. 257 (192 U. S. 226); *American Railway Express Co.* v. *Levee*, 44 Sup. Ct. 11, (263 U. S. 19); *Brown* v. *Western Railway of Alabama*, 70 Sup. Ct. 105 (338 U. S. 294).

The petitioner's rights guaranteed under the Federal Constitution, as shown in the evidence, were violated by the practice of racial discrimination in the selection of the petit jury by the District Attorney of Harris County, Texas, and the Texas Court of Criminal Appeals has determined, under undisputed evidence, that the manner under which such law was administered and applied by the District Attorney was not repugnant to the restrictions of the Federal Constitution against racial discrimination. When a state law is so construed and applied by an administrative officer of a state so as to violate rights guaranteed under the Federal Constitution, this Court must exercise its independent judgment when called upon to determine the Federal right violated, and must determine for itself whether the act as construed and applied by the state administrative officer is repugnant to the restrictions in the Federal Constitution against racial discrimination. This position of the peti-

tioner appears to be sustained by the opinion of this Court in the case of *Ward & Gow* v. *Krinsky, et al*, 42 Sup. Ct. 529 (259 U. S. 503) at page 536. The Court, speaking through Mr. Justice Pitney, stated:

> "But this court, while bound by the construction of the statute adopted by the state court of last resort—that being a question of state law—is not concluded by its reasoning, but must exercise an independent judgment, when called upon to determine the federal question whether the act as construed and applied, is repugnant to the restrictions of the amendment."

The discrimination against members of the Negro race by the District Attorney was the misuse of power possessed by the District Attorney by virtue of Article 614 of the State Practice Act and his power to exclude Nego citizens from service on the petit jury in this case was made possible only because the district attorney was clothed with authority of state law to exclude members of the Negro race from the petit jury on account of race and color. His acts are forbidden and may be reached by the powers of this Court. The power of this Court to reach such wrongful conduct in the misuse of power possessed by virtue of state law was determined by this Court in the case of *United States* v. *Classic*, 61 Sup. Ct. 1031 (313 U. S. 299).

The scheme of selecting a petit jury under the Texas Practice Act on its face is capable of being carried out without any racial discrimination. The wide discretion permissible under the peremptory challenge article is likewise capable of being applied in such manner as to forever prevent any member of the Negro race from serving as a member of the petit jury through the District Attorney as an administrator of the law, if he so desires. Under the peremptory challenge article of the Statutes of Texas, a system of exclusion through the District

Attorney of Harris County, Texas has been manipulated so as to completely exclude members of the Negro race from serving on the petit jury in any criminal case. And under the holding of the Court of Criminal Appeals of Texas in this case and in the *Ross* case, undoubtedly, this system of exclusion on account of race and color will continue to be manipulated by the district attorney, thereby excluding all members of the Negro race from ever serving on a petit jury in Texas, and where Negro citizens are being tried in the Texas courts. This Court perceived such situation might be created under a statutory scheme for the selection of petit juries, for in the case of *Fay* v. *People of New York*, 67 Sup. Ct. 613 (332 U. S. 261), the Court speaking through Mr. Justice Jackson, 1620, stated:

> "Undoubtedly, a system of exclusion could be so manipulated (under statutory scheme of jury selection) as to call a jury before which defendants would have so little chance of a decision on the evidence that it would constitute a denial of due process."

We contend that this case presents such system of exclusion by the manipulation and application of provisions of the Practice Acts of the State of Texas by its district attorney.

Illegal Racial Discrimination is Shown in the Record of This Case by the Undisputed Testimony

The opinion in the case of *Patton* v. *Mississippi*, 68 S. Ct. 184 sustains petitioner's position. In that case the following questions were raised: A Negro citizen had been convicted and given the death sentence. He was convicted by an all-white petit jury. He filed a motion to quash the indictment alleging that there were qualified Negroes in the county for jury service, and that Negroes had been excluded from jury service, in that the list selected for jury service contained the names of no Negro

citizens, and the failure to have Negroes' names on the venire was systematic, intentional and deliberate discrimination which had existed over a period of forty (40) years, in that county.

The Supreme Court of Mississippi differed with the contention of the petitioner, in that case, and sustained the conviction. The facts were similar to the facts in the instant case, except there the Negroes' names were not put on the list; in the instant case, Negroes' names were put on the list, but they were not allowed to serve because they were Negroes, (Tr. 286). This Court has held that where over a long period of time where there are many qualified Negroes and none have been permitted to serve on juries, such evidence presents a prima facie case of racial discrimination. In the case of *Pierre* v. *Louisiana*, 59 S. Ct. 536 (306 U. S. 354), this Court said where there was no evidence that Negroes were not qualified for jury service, the presumption prevailed that a large number was qualified, and in view of testimony here that there were large numbers of Negroes qualified to serve and that none had been allowed to serve, racial discrimination is shown without dispute. The testimony here shows that no Negroes have been permitted to serve on criminal juries. That was not the case in *McMurrin* or *Ross*. The testimony here is without dispute that Negroes had been called for jury service; many were told, when their names were called and their identity was learned, that they could be excused; they did not ask for an excuse. None of the white jurors were excused in such manner, and the testimony is without dispute that no Negroes have served on the petit jury in a criminal case in Harris County in the memory of any of the witnesses, for at least a period of more than forty (40) years. This jury plan selection in excluding Negroes, did not happen by accident or by the terms of the statutory plan for the selection of juries. The exclusion of Negroes happened and could have happened only through the manipulation of the District

Attorney and the officials administering such laws. The jury selection plan as manipulated is operated in such manner as to result into the complete and continued exclusion of any member of the Negro race on criminal juries in Harris County.

A similar issue was passed on by the Supreme Court in *Patton* v. *The State of Mississippi*. Mr. Justice Black writing for the court says:

> "When a jury selection plan, whatever it is, operates in such way as always result in the complete and long-continued exclusion of any representative *at all from a large group of Negroes*, or any other racial group, indictments and verdicts returned against them by juries thus selected cannot stand." (Our italics).

The evidence in the record in this case is without dispute that the jury plan selection as administered in Harris County has operated in such way that it has resulted in complete and long-continued exclusion of all members of the Negro race. The undisputed testimony shows that for a period of more than forty (40) years, only on four (4) different occasions have Negro citizens been permitted to serve on the grand jury commission, and that on the four (4) occasions that Negroes were permitted to serve on the grand jury commission, the number of Negroes that were permitted to serve was limited to one (1) upon each occasion. According to the record, four (4) grand jury commissions have been organized each year for the last forty (40) years which shows that during such period of time one hundred sixty (160) grand jury commissions have been organized. On one hundred fifty-six (156) of such grand jury commissions, Negroes have been excluded. The evidence is without dispute that there was no Negro on the grand jury commission that appointed the grand jury which returned the indictment against the petitioner in this case. The State did not

offer to rebut this testimony. Under the holding of this court, the presumption must prevail that the State was without evidence to rebut such testimony. *Pierre* v. *State of Louisiana*, 59 S. Ct. 536 (306 U. S. 354).

The Court of Criminal Appeals of Texas does not find that the petitioner had not properly asserted in the trial court, and in that court his claim that Federal rights guaranteed to him under the Federal Constitution had been violated and that he was being denied equal protection of laws on account of race and color. But on the contrary that court has passed upon his contention so asserted, and held that under the undisputed facts that members of the Negro race have been limited in their service on grand jury commissions to four (4) times in more than forty (40) years, and have been further limited to only one (1) Negro as a member of the commission on each of the four (4) occasions; that such facts, together with the further fact that no Negro has been permitted to serve on the petit jury in the history of the County, do not show illegal discrimination against petitioner and members of the Negro race by the State of Texas through its administrative officers. If the judicial mind is focused upon the record in this case, the denial of equal protection of laws to the petitioner will be perceived, and when perceived, we believe in the power of this court to correct so great a wrong.

This Court in *Pierre* v. *State of Louisiana*, speaking through Mr. Justice Black on a similar question as the issue here raised said:

> "Indictment by Grand Jury and trial by jury cease to harmonize with our traditional concepts of justice at the very moment particular groups, classes or races—otherwise qualified to serve as jurors in a community—are excluded as such from jury service."

In *Cassell* v. *Texas*, 70 S. Ct. 629, (339 U. S. 282) the Court had before it the question of discrimination by limitation on account of race and color, and the Court held that where the members of the Negro race were limited to one (1) on grand juries, such limitations were forbidden by the constitution of the United States, and that an indictment returned by such grand jury so limited to one (1) member of the Negro race was void. The limitation of one (1) Negro on the grand jury commission in this case and over a period of forty (40) years in Harris County, Texas, under the facts, was not an accident. It was brought to pass by human manipulation, and the exclusion of all members of the Negro race from petit juries in criminal cases likewise was brought about through human manipulation-administrative officers in the State of Texas, and in this case through the District Attorney in Harris County, Texas; that such human manipulation and administration of the statutory plans for the selection of grand and petit juries in this case resulted in the denial of a constutional right of the petitioner of equal protection of laws. The exclusion of members of his race was not by accident.

In the Cassell case Mr. Justice Frankfurter in a concurring opinion aptly stated the petitioner's contention in this case in the following language:

> "The record does disclose stark facts requiring reversal on a very different basis. If one factor is uniform in a continuing series of events that are brought to pass through human intervention, the law would have to have the blindness of indifference rather than the blindness of impartiality not to attribute the uniform factor to man's purpose. The purpose may not be of evil intent or in conscious disregard of what is conceived to be a binding duty. Prohibited conduct

> may result from misconception of what duty requires. Such misconception I believe to be the real situation on the record before us."

If the record in this case is examined by the judicial mind, the illegal racial discrimination against the petitioner in the trial court will be perceived.

Conclusion

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the court below, should be granted; and that upon consideration of said petition upon the record in this case and the law, that this cause be reversed and remanded to the court below for proceedings in conformity with the Constitution of the United States.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 538

JOHNNIE LEE MORRIS,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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